Supreme Court, U.S.
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No. 99-1240

In The
Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES, et al.,

Petitioners,

v.

PATRICIA GARRETT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF MORTON HORWITZ, MARTHA FIELD, MARTHA MINOW AND OVER 100 OTHER HISTORIANS AND SCHOLARS, *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

CASES

In re Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital, 750 A.2d 790 (N.J. Super. Ct. App. Div. 2000) 20

Adapt v. Philadelphia Housing Authority, No. 98-4609, 2000 U.S. Dist. LEXIS 5380 (E.D. Pa. Apr.14, 2000) 15

Adoption of Richardson, 59 Cal. Rptr. 323 (Ct. App. 1967) 19

ARC, Inc. v. New Jersey, 950 F. Supp. 637 (D.N.J. 1996), *later proceeding at* 986 F. Supp. 261 (D.N.J. 1997) 13

Arline v. School Board, 692 F. Supp. 1286 (M.D. Fla. 1988) 6

Assisted Living Associates, L.L.C. v. Moorestown Township, 996 F. Supp. 409 (D.N.J. 1998) 13

Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth, 876 F. Supp. 614 (D.N.J. 1994) 13

Batson v. Kentucky, 476 U.S. 79 (1986) 22

Bednarski v. Bednarski, 366 N.W.2d 69 (Mich. Ct. App. 1985) 19

Boyd v. Board of Registrars of Voters, 334 N.E.2d 629 (Mass. 1975) 20

Brown v. Board of Education, 347 U.S. 483 (1954) 27

Buck v. Bell, 274 U.S. 200 (1927) 16

Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) 13

Carter v. Jury Commission, 396 U.S. 320 (1970) 22

Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D.N.Y. 1990) 14

Chalk v. United States District Court, 832 F.2d 1158 (9th Cir. 1987) 6

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 9, 11, 13

City of Edmonds v. Oxford House, 514 U.S. 725 (1995) 14

Clark v. Clark, 725 N.E.2d 100 (Ind. Ct. App. 2000) 19

Conroy v. Aniskoff, 507 U.S. 511 (1993) 6

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) 15

DeLong v. Brumbaugh, 703 F. Supp. 399 (W.D. Pa. 1989) 23

Doe v. Belleville Public School Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987) 29

Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978) 6

Eckstein v. Kirby,
452 F. Supp. 1235 (E.D. Ark. 1978) 23

Eisenstadt v. Baird,
405 U.S. 438 (1972) 15

Epicenter, Inc. v. City of Steubenville,
924 F. Supp. 845 (S.D. Ohio 1996) 13

Galloway v. Superior Court,
816 F. Supp. 12 (D.D.C. 1993) 23

In the Interest of H.,
218 N.W.2d 441 (N.D. 1974) 29

Hairston v. Drosick,
423 F. Supp. 180 (S.D. W.Va. 1976) 29

Hill v. Shelby County,
599 F. Supp. 303 (N.D. Ala. 1984) 23, 24

H.J.B. v. P.W.,
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Hunter v. Trenton Housing Authority,
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J.W. v. City of Tacoma,
720 F.2d 1126 (9th Cir. 1983) 13

Jackanin v. Carey,
476 F. Supp. 420 (E.D.N.Y. 1979), *aff'd mem.*,
633 F.2d 204 (2d Cir. 1980) 23

Jones v. New York City Transit Authority,
483 N.Y.S.2d 623 (Civ. Ct. 1984) 23

Kentucky Association for Retarded Citizens v. Conn, 510 F. Supp. 1233 (W.D. Ky. 1980),

aff'd, 674 F.2d 582 (6th Cir. 1982), *supplemental op.*, 718 F.2d 182 (6th Cir. 1983) 12

Kroll v. St. Charles County,
766 F. Supp. 744 (E.D. Mo. 1991) 24

Layton v. Elder,
143 F.3d 469 (8th Cir. 1998) 24

Lewinson v. Crews,
282 N.Y.S.2d 83 (App. Div. 1967), *aff'd*, 236 N.E.2d 853 (N.Y. 1968) 22

Majors v. Housing Authority,
652 F.2d 454 (5th Cir. 1981) 15

In re Marriage of Carney,
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In re Marriage of Levin,
162 Cal. Rptr. 757 (Ct. App. 1980) 19

In re Marriage of R.R.,
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Martinez v. School Board,
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Matthews v. Jefferson,
29 F. Supp. 2d 525 (W.D. Ark. 1998) 24

Meyer v. Nebraska,
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Moye v. Moye,
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New York v. County of Delaware,
82 F. Supp. 2d 12 (N.D.N.Y. 2000) 22

New York v. County of Schoharie,
82 F. Supp. 2d 19 (N.D.N.Y., 2000) 22

Olmstead v. L.C. ex rel. Zimring,
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People v. Guzman,
555 N.E.2d 259 (N.Y. 1990) 23

In re Petition of Worcester Children's Friend Society, 402 N.E.2d 1116 (Mass. App. Ct. 1980) 18

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 15

Ray v. School District,
666 F. Supp. 1524 (M.D. Fla. 1987) 29

Reynolds v. Sims,
377 U.S. 533 (1964) 20

Robertson v. Granite City Community Unit School District No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988)..... 29

Saenz v. Roe,
526 U.S. 489 (1999) 25

Schmidt v. City of Chicago,
No. 86 C 8031, 1988 U.S. Dist. LEXIS 12893 (N.D. Ill. Nov. 9, 1988) 6

School Board v. Arline,
480 U.S. 273 (1987) 6

Skinner v. Oklahoma,
316 U.S. 535 (1942) 17

Smith & Lee Associates v. City of Taylor,
102 F.3d 781 (6th Cir. 1996) 14

Society for Good Will to Retarded Children v. Cuomo, 745 F. Supp. 879 (E.D.N.Y. 1990) 12

Stanley v. Illinois,
405 U.S. 645 (1972) 18

State v. Spivey,
700 S.W.2d 812 (Mo. 1985) 23

State ex rel. Beattie v. Board of Education,
172 N.W. 153 (Wis. 1919) 28

Stewart v. Stewart,
521 N.E.2d 956 (Ind. Ct. App. 1988) 19

Stewart B. McKinney Foundation, Inc. v. Town Planning & Zoning Commission,
790 F. Supp. 1197 (D. Conn. 1992) 14

Stoner v. Miller,
377 F. Supp. 177 (E.D.N.Y. 1974) 13

Sunrise Development, Inc. v. Town of Huntington,
62 F. Supp. 2d 762 (E.D.N.Y. 1999) 13

T.E.P. v. Leavitt,
840 F. Supp. 110 (D. Utah 1993) 18

Thomas ex rel. Thomas v. Davidson Academy,
846 F. Supp. 611 (M.D. Tenn. 1994) 29

United States v. Guest,
383 U.S. 745 (1966) 25

United States v. Schulykill Township,
No. 90-2165, 1990 U.S. Dist. LEXIS 15555
(E.D. Pa. Nov. 16, 1990) 14

Watson v. City of Cambridge,
32 N.E. 864 (Mass. 1893) 28

Wisconsin v. Yoder,
406 U.S. 205 (1971) 18

Wyatt ex rel. Rawlins v. Rogers,
985 F. Supp. 1356 (M.D. Ala. 1997) 11

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 19

Youngberg v. Romeo,
457 U.S. 307 (1982) 8, 11

STATUTES

20 U.S.C. § 1400(b) (Supp. IV 1980) 28

1907 ALA. LAWS 313 25

ARIZ. REV. STAT. § 36-582 (1999) 14

ARK. CODE ANN. § 20-48-606 (Michie 1999) 14

CONN. GEN. STAT. § 8-3f (1999) 14

1895 CONN. ACTS 667 17

IND. CONST. art. 8, § 101 27

1918 KY. ACTS 171, § 30 10

1904 MASS. ACTS & RESOLVES, ch. 459, § 5 10

1906 MASS. ACTS & RESOLVES, ch. 508, § 12 10

MICH. COMP. LAWS § 5.2961(16a) (1999) 14

1905 MICH. PUB. ACTS 169-70, No. 121 10

MISS. CONST. art. 7, § 201 27

1920 MISS. LAWS 294, ch. 210, § 17 10

1906 MISS. LAWS 1011 25

1901 MO. LAWS 132 25

N.J. REV. STAT. § 40:55d-66.1 (1995) 14

1919 N.J. LAWS 508, ch. 217, §3 10

N.M. CONST. art. XII § 5(2000) 28

N.C. GEN. STAT. § 168-22 (1999) 14

N.D. CONST. art. 8, § 147 27

1909 OKLA. SESS. LAWS 538, ch. 34, art. 2 § 8 10

1917 OR. LAWS 740, § 5 10

1921 S.D. SESS. LAWS 344, ch. 235 10

1915 TEX. GEN. LAWS ch. 90 §1,2 10

UTAH CODE ANN. § 17-5-252 (1999) (repealed May 1, 2000) 26

UTAH CODE ANN. § 30-1-2(1) (1987) 17

1905 WASH. LAWS 135, ch. 70, § 9 10

1921 W. VA. ACTS 480, ch. 131, § 4(a) 10

WIS. STAT. § 60.63 (1999) 14

1913 WIS. LAWS, 963, ch. 689, § 1 9

CHICAGO MUN. CODE § 36-34 (1966) 14

COLUMBUS GEN. OFFENSE CODE 2387.04 (1972) 14

OMAHA MUN. CODE 251 (1967) 14

LEGISLATIVE MATERIALS

S. Rep. No. 101-485 (II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 6

Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcommittee on Employment Opportunities and the Subcommittee on Select Education of the House Committee on Education and Labor, 101st Cong. (Sept. 13, 1989) 3

135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) 21

135 Cong. Rec. S10753 (daily ed. Sept. 7, 1989) 21

S. Rep. 101-116 (1989) 14, 28, 30

Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, 101st Cong. (May 9, 1989) 4, 28

American with Disabilities Act of 1988: Oversight Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor 100th Cong. (Oct. 24, 1988)..... 3, 4

133 Cong. Rec. H6996 (daily ed. Aug. 4, 1987)..... 5

Civil Rights Restoration Act of 1987: Hearings on S. 557 Before the Senate Committee on Labor and Human Resources 100th Cong. (Mar. 19, 1987)..... 5

Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 370 and H.R. 1294 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong. (June 6, 1985)..... 2

Rehabilitation Act of 1973: Oversight Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong. (Apr. 7,1978)..... 5

Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong. (Sept. 16, 1977)..... 4

MISCELLANEOUS

Debra Auspitz, *Disabled Votes*, PHILADELPHIA CITY PAPER, Mar. 9-16, 2000..... 21

Baldwin, *The Causes, Prevention and Care of Feeble-minded Children in Proceedings of Texas Conference of Charities and Corrections*, Second Annual Meeting (1912) 9

Board of Trustees of Utah State Training School, *Biennial Report* (1938) 9

Burgdorf, *A History of Unequal Treatment*, 15 SANTA CLARA LAWYER 855 (1975) 27

California State Board of Charities and Corrections, *Eighth Biennial Report* (1918) 26

Dong W. Cho, Cerebral Palsy Research Foundation of Kansas, Inc., *Problem Solving with Rehabilitation Engineering: Labor Market Activities of Disabled Persons: Analysis of a National Survey of Disabled Persons* (Spring 1982) 2, 7

Coalition for Accessible Political Elections, *Report of National Voter Independence Project* (Feb. 1999) 21

Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991) 27

Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (Apr. 1989) 2

General Accounting Office, *Medicaid - Oversight of Institutions for the Mentally Retarded Should be Strengthened* (Sept. 6, 1996) 12

Sharon L. Harlan & Pamela M. Robert, *Disability in Work Organizations: Barriers to Employment Opportunity,* Final Report, (Univ. of Albany & State U.N.Y. Nov. 1995) 2, 7

Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMPLE L.Q. 1 (1986) 2, 6

Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925 (1994) 14

Latinos Still Lag in State Hiring, Lawmakers Told, L.A. TIMES, Apr. 15, 1988..... 5

Harry H. Laughlin, *Eugenical Sterilization in the United States* (American Eugenics Society, 1926) 16

M. Lazerson, *The Origins of Special Education* (1983) 27

Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (Apr. 1985) 16

Meyer & Putnam, *Social Integration, in* HANDBOOK OF DEVELOPMENTAL AND PHYSICAL DISABILITIES 107 (V. B. Van Hasselt, P. Strain & M. Hersen, eds. 1988) 28

Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (Dec. 1993) 25

N.Y. TIMES, Feb. 18, 1912 26

Oregon Board of Building Commissioners Report to Twenty-fourth Legislative Assembly, Regular Session (1906) 9

Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (1991) 16, 26

Report Card on Inclusion in Education of Children with Mental Retardation (The Arc 1995) 29

Report Finds Legal Discrimination Against Women State Job Holders, UPI, Cal., Jan. 8, 1989 5

Report of Vermont State School for Feeble-minded Children (1916) 9

David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Little, Brown & Co. 1971) 10

Bruce Dennis Sales et al., *Disabled Persons and the Law: State Legislative Issues* (Plenum Press 1980) 17, 18

S. Sarason & L. Doris, EDUCATIONAL HANDICAP, SOCIAL POLICY AND SOCIAL HISTORY (1979) 27

Stevenson Smith et al., *A Summary of the Laws of the Several States Governing (I) Marriage and Divorce of the Feebleminded, the Epileptic and the Insane, (II) Asexualization, (III) Institutional Commitment and Discharge of the Feebleminded and the Epileptic*, 82 BULL. U. WASH. 5 (May 1914) 17

Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee (Jan. 1997) 25

20/20: Breeding Better Citizens; Forced Sterilization of Americans Believed to Have Some Mental Defect (ABC television broadcast Mar. 22, 2000) 16

Voting Rights Primary Access Committee, *Exercising My Right to Vote: The Accessibility of New Hampshire Polling Places to Citizens with Disabilities* (Apr. 1996) 21

Weintraub & *Abeson, Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972) 27

When Illness Leaves Social Side Effects, U.S. NEWS & WORLD REPORT (Aug. 13, 1984) 5

C.S. Yoakum, *Care of the Feebleminded and Insane in Texas*, BULL. U. TEX. No. 369 (Humanistic Ser. No. 16 Nov. 5, 1914) 9

INTEREST OF THE *AMICI CURIAE*

Amici curiae are over 100 historians and scholars who want to ensure that the well-documented evidence of widespread state discrimination against persons with disabilities is not forgotten by this Court.*

ARGUMENT

Persons with a broad range of disabilities – cognitive, motor, sensory and psychiatric – have been victims of intentional and irrational state-sponsored discrimination and exclusion from the basic rights and citizenship in every aspect of public and private life, including employment, housing, the judicial system, marriage, parenting, and education. Congress was aware of the centuries of discrimination by state and local governments against persons with disabilities when it enacted the ADA. This brief summarizes the states' history of official discrimination. The appendix contains hundreds of examples of state constitutions and laws that discriminate against these citizens.

I. STATE EMPLOYERS HAVE DISCRIMINATED AGAINST PERSONS WITH DISABILITIES

A. When The ADA Was Enacted, State Employment Discrimination Against Persons With Disabilities Was Pervasive

For decades, state employers have engaged in intentional widespread discrimination against people with disabilities. Congress documented this rampant discrimination when it adopted the ADA. According to a 1989 report of the Advisory Commission on Intergovernmental Relations – issued during the deliberations

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* Petitioners, Respondents and the United States have consented to the filing of this brief.

on the ADA – 82 percent of state officials believed that negative attitudes towards persons with disabilities played a part in their employment decisions.[1] Congress knew that discrimination against persons with disabilities was "more prevalent in the public sector."[2] Although Alabama claims (at p. 7) that it "has a long history or providing support, rehabilitation and protection for individuals with disabilities," a comprehensive 1980s study found that (except for persons with speech impairments), the percentage of persons with disabilities working for the government was actually *lower* than in the private sector.[3] This state-sponsored employment discrimination is not only irrational, but has pervasively reinforced broader employment discrimination against persons with disabilities. If the states were "teaching by their example" (Pet. Br. 4), then the lesson was that official job discrimination was pervasive.

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1 *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989). *See also* Sharon L. Harlan & Pamela M. Robert, *Disability in Work Organizations: Barriers to Employment Opportunity*, Final Report, (Univ. of Albany & State U.N.Y. Nov. 1995) (reporting on 1990 data) (state employees "confront disabilities with stereotypes, ignorance, misinformation, fear, and pity that impede progress toward equal opportunity"); Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMPLE L.Q. 1, 2-9 (1986) (describing reasons and types of public employment discrimination against persons with cancer).

2 *Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 370 and H.R. 1294 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong. 57 (June 6, 1985) (statement of Ivan Barofsky, Institute of Social Oncology).

3 Dong W. Cho, Cerebral Palsy Research Found. of Kansas, Inc., *Problem Solving with Rehabilitation Engineering: Labor Market Activities of Disabled Persons: Analysis of a National Survey of Disabled Persons*, iii (Spring 1982).

B. The Congressional Record Is Filled With Evidence Of State Employment Discrimination

The legislative history of the ADA shows that Congress was aware of widespread intentional and irrational employment discrimination by the states. For example, Congress was aware that most government agencies in California routinely refused to hire cancer survivors.[4] The Congressional testimony of individual witnesses in hearings on the ADA also reflected employment discrimination by states. For example:

- Susan Downie testified that she was denied a job at a large state mental retardation facility because of her mobility impairment.[5]

- Denise Karuth testified that the New York State Commission for the Blind would not sponsor her for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors."[6]

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4 *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Employment Opportunities and the Subcomm. on Select Education of the House Comm. on Education and Labor*, 101st Cong. 19-20 (Sept. 13, 1989) (statement of Evan J. Kemp, Jr., Commissioner EEOC).

5 *Americans with Disabilities Act of 1988: Oversight Hearing on H.R. 4498 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong. 144-45 (Oct. 24, 1988) (statement of Susan Downie, Director, Traumatic Brain Injury Services, Rehabilitation Center, Hartford).

6 *Id.* at 195 (statement of Denise Karuth, Mass. Coalition of Citizens with Disabilities).

- A professor of veterinary medicine at a state university was fired because he had AIDS.[7]

Congress also found that state vocational rehabilitation agencies excluded adults with long-term disability. Congress knew, for example, that Rhode Island's state vocational rehabilitation agency refused to provide a quadraplegic with further education because "they did not see any reason" for him to get off the SSI public benefits rolls.[8] A witness from Maine recounted how a vocational client with a Ph.D. in chemistry "was sent to Goodwill to sort socks as a part of his training and testing."[9]

Congress had been aware of state-sponsored employment discrimination against persons with disabilities for years. For example, in 1977, Congress was informed of the growth of violations of Section 504 of the Rehabilitation Act by colleges and universities, school districts, and government agencies.[10] In 1978, Congress learned that persons with disabilities were under-represented in the CETA program, in which federal funds were given, principally to

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7 *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong. 404 (May 9, 1989) (statement of National Organizations Responding to AIDS).

8 *Hearings*, *supra* note 5, at 41 (statement of Donald Levine, President PARI Independent Living Program).

9 *Id.* at 173 (statement of Lelia Batten, Portland Coalition for Psychiatrically Labeled).

10 *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 290-368 (Sept. 16, 1977) (statement of David Tatel, Director, Office for Civil Rights, Dep't of Health, Education and Welfare).

states and counties, for job training and employment.[11] In 1987, Congress found that "public and private employers tend to be unaware of the capability of persons with developmental disabilities to be engaged in competitive work in integrated settings."[12] Also in 1987, Congress knew that *none* of the twenty-three state or local jurisdictions surveyed was willing to hire blind applicants; many excluded applicants with a history of cancer; and amputees faced widespread official discrimination.[13]

Alabama claims (at pp. 38-39) that in the ADA's legislation history, the "only real evidence . . . was of states over protecting the constitutional rights of the disabled, not undermining them." To the contrary, Congress knew that the Governor's Committees of all fifty states, responsible for increasing the employment of persons with disabilities

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11 *Rehabilitation Act of 1973: Oversight Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor,* 95th Cong. 336, 368 (Apr. 7, 1978) ("During the 15 months ending September 30, 1976, handicapped men and women made up only 4% - 81,000 - of all persons enrolled in title I programs and less than 3% of those in public service jobs under titles II and IV.") (statement of T.P. Hipkens, Director, Ass'n of Rehabilitation Facilities).

12 133 Cong. Rec. H6996 (daily ed. Aug. 4, 1987). There were also numerous news articles about state employment discrimination against persons with disabilities. *See, e.g., Report Finds Legal Discrimination Against Women State Job Holders,*" UPI, Cal., Jan. 8, 1989 (1988 Personnel Board report showed significant underrepresentation of workers with disabilities in state jobs); *Latinos Still Lag in State Hiring, Lawmakers Told,* L.A. TIMES, Apr. 15, 1988 (1987 Personnel Board report showed workers with disabilities second-most underrepresented group in state jobs); *When Illness Leaves Social Side Effects,* U.S. NEWS & WORLD REPORT (Aug. 13, 1984) (noting conflicting state court decisions regarding disability discrimination).

13 *Civil Rights Restoration Act of 1987: Hearings on S. 557 Before the Senate Comm. on Labor and Human Resources,* 100th Cong. (Mar. 19, 1987).

generally, had reported that state laws were inadequate to counter discrimination faced by persons with disabilities.[14] At least half of the state laws that did exist provided no protection against discrimination based on perceived disabilities.[15]

C. Case Law Establishing State-Sponsored Employment Discrimination

Congress was also aware of the numerous cases establishing intentional and irrational state-sponsored disability discrimination in employment.[16] In *School Board v. Arline*, 480 U.S. 273 (1987), the Court held actionable state employment discrimination based upon irrational fears of a disability. On remand, the trial court held that a school district's termination of a teacher with tuberculosis was unreasonable. *Arlene v. School Board*, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988). Similarly, in *Chalk v. United States District Court*, 832 F.2d 1158 (9th Cir. 1987), a teacher was demoted after being diagnosed with AIDS. In *Duran v. City of Tampa*, 451 F. Supp. 954, 955 (M.D. Fla. 1978), a police officer applicant with a childhood history of epilepsy was rejected because of an irrational policy excluding those with any history of epilepsy, despite medical evidence that the applicant was able to serve as police officer. In *Schmidt v. City of Chicago*, No. 86 C 8031, 1988 U.S. Dist. LEXIS 12893 (N.D. Ill. Nov. 9, 1988), a police officer who underwent double mastectomy and breast reconstruction due to cancer was told to resign because of her prosthetic breasts.

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14 S. Rep. No. 101-485(II), at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 320.

15 Hoffman, *supra* note 1, at 20.

16 *See Conroy v. Aniskoff*, 507 U.S. 511, 516 & n.10 (1993) (Court presumes Congress is aware of the relevant case law).

D. Statistical Data Show State Employment Discrimination

Petitioner claims (at p. 4) that "[n]o pattern and practice of state equal-protection violations exist when it comes to alleged employment or public-access discrimination by state governments. Neither does any tenable threat of future unconstitutional discrimination exist. . . . Congress did not show, or even try to show, that the states have previously violated the constitutional rights of the disabled." To the contrary, at the time the ADA was enacted, Congress had access to statistical data showing that persons with disabilities were under-represented in government employment, and that discrimination was more prevalent in the public than private sector.[17]

In many states, the percentage of state employees with disabilities remains well below the percentage of working age Americans with disabilities, and in some states things are getting worse. For instance, California reports that the percentage of state employees with disabilities has steadily decreased in the last decade, from 8.27 percent in 1990 to 7.64 percent in 2000.[18] In several other states, the figures are also declining. Michigan's employment of disabled persons fell from 7.5 percent in 1990-91 to 5.7 percent in 1998-99.[19] Nebraska's figures were 4.3 percent in

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17 Cho, *supra* note 3, at iii.

18 Correspondence from Richard Watkins, MIS Dept., California State Personnel Bd., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 7, 2000) (A-278).

19 Letter from Mary L. Pollock, Employment Relations Bd. Appeals Officer (former State Equal Employment Opportunity Coordinator), Dep't of Civil Service, State of Mich., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 19, 2000) (A-279).

1990, but had fallen to 3.2 percent as of March 30, 2000.[20] Iowa's figures are also on the decline: from 5.8 percent in 1992 to 4.5 percent in 1998.[21]

II. STATES HAVE HISTORICALLY DENIED PERSONS WITH DISABILITIES THE RIGHT TO LIVE IN THE COMMUNITY

A. The Shameful History Of State-Sponsored Institutionalization

The right to make basic decisions about how to live, as well as the right to be free from bodily restraints, have long been recognized as core liberty interests protected by the due process clause. *See Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). Nevertheless, the states have historically segregated and institutionalized persons with a wide range of disabilities, trammeling their fundamental liberties and warehousing them in deplorable public facilities.

1. The State-Mandated Regime of Segregation

The forced institutionalization of persons with disabilities reached its peak in the twentieth century. It continues today. "Fueled by the rising tide of Social Darwinism, the 'science' of eugenics, and the extreme xenophobia of those years, leading medical authorities and

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20 E-mail correspondence from Dorsey Seldon, Affirmative Action Specialist, Dep't of Administrative Services, Personnel Department, State of Neb., to Suzan Kern, Advocacy, Inc., Austin, Tex. (June 21 & 22, 2000) (A-285).

21 Correspondence from John H. TenPas, Disability Consultant, Division of Persons with Disabilities, Iowa Dep't of Human Rights, to Brian East, Advocacy, Inc., Austin, Tex. (June 22, 2000) (A-287).

others began to portray the 'feebleminded' as a 'menace to society and civilization . . . responsible in large degree for many if not all, of our social problems.'" *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part). In 1914, one authority declared, "One of the most shocking and easily cured evils is the increase of the feeble-minded, the begetters of numerous degenerate children." C.S. Yoakum, *Care of the Feebleminded and Insane in Texas*, BULL. U. TEX., No. 369 (Humanistic Ser. No. 16 Nov. 5, 1914). Official reports referred to people with disabilities as "defect[s] . . . [that] wounds our citizenry a thousand times more than any plague,"[22] as "by-products of unfinished humanity,"[23] and as a "blight on mankind"[24] whose mingling with society was "a most baneful evil."[25]

Spurred by the eugenics movement, every state in the country passed laws that singled out people with mental or physical disabilities for institutionalization. (Many of those laws are reproduced in the Appendix.) Often, these laws made it clear that the state's purpose was not to benefit disabled people but to segregate them from "normal" society. Thus, statutes noted that the disabled were segregated and institutionalized for being a "menace to society,"[26] so that

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22 Board of Trustees of the Utah State Training School, *Biennial Rep.* 3 (1938).

23 Baldwin, *The Causes, Prevention, and Care of Feeble-minded Children in Proceedings of the Texas Conference of Charities and Corrections*, Second Annual Meeting 87 (1912).

24 *Report of Vermont State School for Feeble-minded Children* 17-18 (1916).

25 *Oregon Bd. of Bldg. Comm'rs Report to the Twenty-fourth Legis. Assembly*, Regular Sess., 22-23 (1906).

26 1913 WIS. LAWS 963, ch. 689, § 1 (App. 272).

"society [may be] relieved from the heavy economic and moral losses arising from the existence at large of these unfortunate persons."[27]

The state-sponsored mission to remove persons with disabilities from society was so pervasive that many state governments even required their citizenry to assist them in locating and segregating these citizens. Physicians, teachers, and social workers, and even the general public were to report to the government all persons "believed by them to be feeble minded."[28] Some statutes authorized the removal of children with disabilities from their homes, even against the parents' wishes.[29] The state of Washington made it a crime for a parent to refuse state-ordered institutionalization. *See* 1905 WASH. LAWS 135, ch. 70, § 9 (App. 263). Once children were institutionalized, many state laws required parents to waive all custody rights.[30]

These state laws mandating institutionalization were "A regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive

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27 1915 TEX. GEN. LAWS ch. 90 § 1, 2 (App. 243). Similar statutes from other states are collected in the Appendix.

28 *See, e.g.,* 1921 S.D. SESS. LAWS 344, ch. 235 (teachers); 1917 OR. LAWS 740, § 5 (superintendents); 1918 KY. ACTS 171, § 30 (nurses); 1904 MASS. ACTS & RESOLVES, ch. 459, § 5 & 1906 MASS. ACTS & RESOLVES, ch. 508, §12 (any person).

29 *See, e.g.,* 1920 MISS. LAWS 294, ch. 210, § 17; 1921 W.VA. ACTS 480, ch. 131, § 4(a); 1909 OKLA. SESS. LAWS 538, ch. 34, art. 2 § 8.

30 *See, e.g.,* 1905 MICH. PUB. ACTS 169-70, No. 121; 1919 N.J. LAWS 508, ch. 217, §3. *See generally* David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 221 (Little, Brown & Co. 1971).

custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part) (citations omitted).

2. Ongoing State-Sponsored Discrimination

In *Olmstead v. L.C. ex rel. Zimring*, six justices recognized that singling out persons with disabilities for unnecessary institutionalization is a form of discrimination. 527 U.S. 581, 600 (1999), *id.* at 613-14 (Kennedy, J., concurring). This kind of state discrimination frequently violates the due process rights recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

Many state-run institutions continue to deprive disabled persons of liberty and dignity, while exposing residents to dangerous conditions. For example, in *Wyatt ex rel. Rawlins v. Rogers*, 985 F. Supp. 1356, 1362 (M.D. Ala. 1997), a federal judge described Alabama's state-run institutions as "essentially warehousing patients in an inhumane environment." Petitioner's state hospital lacked "a humane psychological and physical environment, qualified staff in numbers sufficient to administer adequate treatment, and individualized treatment plans." *Id.* at 1361. Even though Alabama entered into a consent decree to improve the state's record on institutionalization, a court-appointed expert concluded in 1991 that "there remain[ ] significant problems and noncompliance . . . most significantly, unnecessary institutionalization." *Id.* *Wyatt* squarely contradicts Petitioner's claim (at p. 7) that "Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities."

New York's Long Island Development Center was dismally described by a federal judge: "[V]isits by the court to the Center revealed a deplorable situation. Clients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television. The facility's inadequate professional personnel failed to provide suitable training or educational programs for residents. Entry into the institution often led to swift physical and emotional deterioration and loss of skills. The huge population of some fifteen hundred clients made effective management and control impossible." *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990). Kentucky's Outwood Institution has been described as "atrocious." *Kentucky Ass'n for Retarded Citizens v. Conn*, 510 F. Supp. 1233, 1237 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *supplemental op.*, 718 F.2d 182 (6th Cir. 1983).

Congress knows that this state-sponsored discrimination has not stopped. The General Accounting Office revealed "serious quality-of-care deficiencies" in our nation's large public institutions for the mentally retarded. The most prevalent problems are "insufficient staffing, lack of active treatment, and deficient medical and psychiatric care." These problems have at times led to serious harm to residents, "including injury, illness, physical degeneration, and even death." General Accounting Office, *Medicaid – Oversight of Institutions for the Mentally Retarded Should be Strengthened* (Sept. 6, 1996).

B. Discrimination In Zoning And Public Housing

Outside state-run institutions, the states have excluded persons with disabilities from the community through discriminatory zoning laws and restrictions on public

housing. In 1996, a federal court bluntly concluded that "[c]ities . . . reacted to the deinstitutionalization movement in a manner similar to that of the postbellum Southern state governments that passed Jim Crow laws; they enacted restrictive zoning ordinances that precluded assimilation by the handicapped." *Epicenter, Inc. v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996). At the time of the enactment of the ADA, this form of discrimination was extensive.[31]

Zoning discrimination continues today through several methods. Some subdivisions of the states have deliberately amended zoning laws to halt the establishment of group homes for the disabled.[32] Others have enacted zoning ordinances restricting the number of unrelated persons who

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31 *See, e.g., Cleburne*, 473 U.S. at 450 (holding that a city ordinance requiring the operator of a group home for the mentally retarded to obtain a special use permit violates the equal protection clause); *J.W. v. City of Tacoma*, 720 F.2d 1126, 1127 (9th Cir. 1983) (holding that the city's refusal to issue a special use permit to the operator of housing for the mentally disabled violated the due process clause of the Fourteenth Amendment); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) (declaring unconstitutional several provisions of a city ordinance regulating disabled housing); *Stoner v. Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974) (finding unconstitutional a city ordinance that prohibited mentally ill persons from registering in hotels and boarding houses).

32 *See, e.g., ARC, Inc. v. New Jersey*, 950 F. Supp. 637, 639-41 (D.N.J. 1996) (invalidating discriminatory zoning law), *later proceeding at* 986 F. Supp. 261 (D.N.J. 1997); *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 617 (D.N.J. 1994) (same). *See also Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 774-75 (E.D.N.Y. 1999) (granting injunction against zoning law); *Assisted Living Assoc., L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 414 (D.N.J. 1998) (same).

can reside in certain communities.[33] Still others have enacted dispersal and density laws limiting the establishment of group homes.[34] Another example of state-sponsored discrimination against persons with disabilities is "ugly laws," local ordinances that forbid people with "unsightly" or "disgusting" physical conditions from appearing in public.[35] These laws were part of the Congressional Record when the ADA was enacted.[36]

A review of judicial opinions shows that state and local public housing authorities have refused to rent to persons with physical and mental disabilities. For example, in *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002, 1005 (W.D.N.Y. 1990), the Rochester Housing Authority

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33 *See, e.g., City of Edmonds v. Oxford House*, 514 U.S. 725, 728 (1995); *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 786 (6th Cir. 1996); *Stewart B. McKinney Found., Inc. v. Town Planning & Zoning Comm'n*, 790 F. Supp. 1197, 1207 (D. Conn. 1992); *United States v. Schulykill Township*, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *6-*7 (E.D. Pa. Nov. 16, 1990).

34 These statutes are set forth in the Appendix. *See, e.g.*, ARIZ. REV. STAT. § 36-582 (1999) (requiring 1,200 feet between homes for the disabled) (App. 16); ARK. CODE ANN. § 20-48-606 (Michie 1999) (3,000 feet) (App. 23); CONN. GEN. STAT. § 8-3f (1999) (1,000 feet) (App. 45); MICH. COMP. LAWS § 5.2961(16a) (1999) (1,500-3,000 feet) (App. 142); N.J. REV. STAT. § 40:55d-66.1 (1995) (1,500 feet) (App. 180); N.C. GEN. STAT. § 168-22 (1999) (half-mile) (App. 195); WIS. STAT. § 60.63 (1999) (2,500 feet) (App. 269). One commentator has described density limits as "among the most irrational legislative reactions to the establishment of homes for people with mental disabilities." Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 977 n. 313 (1994).

35 *See, e.g.*, CHICAGO MUN. CODE § 36-34 (1966); COLUMBUS GEN. OFFENSE CODE 2387.04 (1972); OMAHA MUN. CODE 25 (1967).

36 S. Rep. No. 101-116, at 7 (1989).

denied an applicant housing because she had a "need for a wheelchair" and was "incontinent." In *Hunter v. Trenton Housing Authority*, 698 A.2d 25, 26 (N.J. Super. Ct. App. Div. 1997), a physically disabled man was denied permission by the Trenton Housing Authority to build (at his own expense) a wheelchair ramp to enter his apartment.[37]

III. STATES INTERFERE WITH THE RIGHT OF PERSONS WITH DISABILITIES TO FORM FAMILIES

A. States Have Forcibly Sterilized Persons With Disabilities

The Court has repeatedly recognized that the right to control one's ability to procreate, "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," is fundamental. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *accord Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). The Court has also recognized a fundamental right to bodily integrity under the due process clause. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990).

The states share a long and shameful history of depriving persons with disabilities of the right and ability to procreate. By the early 1930s, more than thirty states had enacted sterilization laws permitting the involuntary sterilization of persons in state institutions, including "the

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37 *See also, e.g., Majors v. Housing Auth.*, 652 F.2d 454, 454 (5th Cir. 1981) (public housing operator refused to waive its no pet policy to accommodate a disabled tenant); *Adapt v. Philadelphia Hous. Auth.*, No. 98-4609, 2000 U.S. Dist. LEXIS 5380, at * 1 (E.D. Pa. Apr. 14, 2000) (city public housing authority failed to provide enough handicapped accessible public housing units).

feeble-minded, "epileptics," "idiots," "morons," "mental defectives," "socially inadequate," "the diseased," "alcoholics," "manic-depressives," "schizophrenics," and "mentally enfeebled paralytics."[38] Between 1907 through 1963, those laws were used by the states to sterilize at least 60,000 persons.[39] In its infamous decision of *Buck v. Bell*, 274 U.S. 200, 205-07 (1927), the Court explicitly endorsed the involuntary sterilization of a seventeen-year old girl.[40]

The states' reasons for legalizing and carrying out sterilizations of persons with disabilities were to eradicate a group of persons who allegedly "burdened" society. The eugenics-motivated state actions have never had a valid justification.[41] Far from leading the people into enlightenment, as Petitioner and its *amici* would lead this Court to believe,[42] the states have been responsible for some

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38 Many examples of these statutes are set forth in the Appendix. *See generally* Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 45-55 (1991); Harry H. Laughlin, *Eugenical Sterilization in the United States* (American Eugenics Soc'y 1926).

39 Reilly, *supra* note 38, at 94.

40 *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 31 (Apr. 1985).

41 In Michigan, Ted Aslin and his brother, Fred, were involuntarily sterilized at the age of 18 by the state of Michigan in 1944 because they were "feeble-minded morons." After their release, Fred and Ted went on to raise adopted sons. For more than a decade, Ted Aslin has acted as a licensed foster parent to approximately 100 children. *20/20: Breeding Better Citizens: Forced Sterilization of Americans Believed to Have Some Mental Defect* (ABC television broadcast Mar. 22, 2000).

42 *See* Pet. Br. at 38-39 (states have been "overprotecting the constitutional rights of the disabled"); Brief of *Amicus Curiae* of Hawaii, et al., at 10 (states "are generally held up as positive examples").

of the most horrible discrimination against persons with disabilities.

B. State Discrimination Regarding The Right to Marry

The right to marry has long been considered fundamental. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Marriage is one of the "basic civil rights of man." *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). Nevertheless, persons with disabilities have faced state-imposed restrictions upon their right to marry. For example, Connecticut law provided that, "No man or woman, either or whom is epileptic, imbecile, or feeble-minded, shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age." 1895 CONN. PUB. ACTS 667. By 1914, thirty-seven states and the District of Columbia had laws restricting marriage for persons who were "epileptic," "diseased," "insane," "lunatics," "imbeciles," "alcoholics," or "feeble-minded."[43]

The vast majority of states maintained such statutes into the present era.[44] For example, in 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited and . . . void." UTAH CODE ANN. § 30-1-2(1) (1987). Relying on the ADA, a

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43 Stevenson Smith et al., *A Summary of the Laws of the Several States Governing (I) Marriage and Divorce of the Feebleminded, the Epileptic and the Insane, (II) Asexualization, (III) Institutional Commitment and Discharge of the Feebleminded and the Epileptic*, 82 BULL. U. WASH. 5-15 (May 1914).

44 Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* 16-20 (Plenum Press 1980) (as of 1980, 42 states and the District of Columbia had statutes restricting marriage for persons with disabilities).

federal court struck down the statute in 1993. *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993).

C. States Discrimination Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin v. Yoder,* 406 U.S. 205, 233-34 (1971). A review of state court decisions reflect a pervasive presumption that parents with disabilities are automatically unfit.[45] For example, a state court in Massachusetts approved an adoption against the will of the child's mother, who had been hospitalized several times for depression following the deaths of her father and uncle. The appellate court vacated the ruling, noting testimony that the woman was loving and caring to her child. *In re Petition of Worcester Children's Friend Soc'y,* 402 N.E.2d 1116 (Mass. App. Ct. 1980).

Courts have also applied the "best interests of the child" standard to find that a parent with disabilities is unfit. For example, in 1993, an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive. *H.J.B. v. P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993). A California trial court refused to permit an adoption of a child by a deaf couple, despite the uncontested supporting testimony of thirteen witnesses. The appellate court reversed the ruling, holding that "[t]here can be no doubt that the judge was biased and prejudiced against appellants . . . solely because they were deaf-mutes." *Adoption of Richardson,* 59

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[45] Most states have laws permitting the termination of rights of disabled parents. *See* Sales, *supra* note 44, at 459-66 (analyzing and critiquing guardianship statutes from all 50 states).

Cal. Rptr. 323, 327-29 (Ct. App. 1967). A Michigan trial court terminated a deaf woman's custody of her "two normal children," citing her deafness, forcing the appellate court to reverse. *Bednarski v. Bednarski,* 366 N.W.2d 69, 73 (Mich. Ct. App. 1985).[46] The stereotypes of state judges regarding the abilities of persons with disabilities to raise their children remain unchanged. Last year, a trial judge ordered that a blind father – a successful CEO of a computer company – must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark v. Clark,* 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court).

The sordid story of state-sponsored sterilization, and restrictions on marriage and parenting, is one of the most shameful chapters in our national history. These facts firmly refute the uninformed assertion by a handful of states that "the legislative record fails to reflect evidence of discriminatory – no less unconstitutional – conduct by states concerning the disabled."[47]

IV. STATES HAVE HISTORICALLY INTERFERED WITH THE RIGHTS OF DISABLED PERSONS TO VOTE

Voting is a fundamental political right, because it is preservative of all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Undoubtedly, the right of suffrage is a

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46 *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (multiple sclerosis); *Moye v. Moye,* 627 P.2d 799 (Idaho 1981) (epilepsy); *Stewart v. Stewart,* 521 N.E.2d 956 (Ind. Ct. App. 1988) (HIV); *In re Marriage of Carney,* 598 P.2d 36, 40 (Cal. 1979) (quadraplegic); *In re Marriage of Levin,* 162 Cal. Rptr. 757 (Ct. App. 1980) (stroke).

47 Brief of *Amicus Curiae* of Hawaii, et. al., at 9.

fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

A. State-Sponsored Exclusion Of Voters With Disabilities

At the time of the enactment of the ADA, virtually every state had specific constitutional provisions, statutes, or case law that prohibited individuals with cognitive or emotional impairments from voting. (Many of these statutes are set forth in the Appendix.) Although disenfranchisement may be justified following a hearing on the issue, many states, however, routinely deny persons in institutions with lesser or temporary cognitive or emotional disabilities the right to vote without a specific finding that such persons are incompetent to do so.

For example, in *Boyd v. Board of Registrars of Voters*, 334 N.E.2d 629, 632 (Mass. 1975), institutionalized persons attempted to register to vote, but were refused because of their disability. The Supreme Judicial Court reversed. Similar discrimination persists to this day. In an action enjoined by the court, in *In re Absentee Ballots Cast By Five Residents of Trenton Psychiatric Hospital*, 750 A.2d 790, 793-94 (N.J. Super. Ct. App. Div. 2000), the Board of Election made no individualized competence inquiry but simply refused to credit the votes by residents of a mental hospital.

B. State Discrimination Against Persons With Disabilities On Election Day

On election day in virtually every state, many people with disabilities have been, and continue to be, denied the right to cast a ballot in their neighborhood polling place. The legislative history of the ADA reflected state-sponsored electoral discrimination. *See, e.g.,* 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) (statement of Sen. Biden, recounting a constituent who had to crawl or hire an ambulance to vote); *id.* at S10753 (statement of Sen. Gore, criticizing "the tradition of blatant and subtle discrimination" of states to accommodate persons with disabilities on election day).

Such discrimination is pervasive and ongoing. For example, in 1996, fifty-nine percent of New Hampshire's polling places were physically inaccessible to people with disabilities.[48] A recent nationwide survey revealed that forty-seven percent of the respondents' polling places lacked an accessible path to the voting area and that fifty-two percent of the respondents' polling places lacked an appropriately sized booth for persons using wheelchairs.[49] A March 2000 survey found that only twenty-seven percent of Philadelphia's 1681 polling places were properly accessible.[50] Confronted with evidence that, in two New York counties, all polling places but one were inaccessible to persons with disabilities, a federal court ordered access to be

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48 Voting Rights Primary Access Committee, *Exercising My Right to Vote: The Accessibility of New Hampshire Polling Places to Citizens with Disabilities* (Apr. 1996).

49 Coalition for Accessible Political Elections, *Report of the National Voter Independence Project* (Feb. 1999).

50 Debra Auspitz, *Disabled Votes*, PHILADELPHIA CITY PAPER, Mar. 9-16, 2000.

made pursuant to the ADA. *New York v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); *New York v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000). Without the ADA and its attendant consequences for non-compliance, many states would simply continue their "tradition of blatant and subtle discrimination" against its citizens with disabilities.

V. STATES HAVE DENIED PERSONS WITH DISABILITIES EQUAL ACCESS TO THE COURTS

A. Until the ADA Was Enacted, States Routinely Excluded Disabled Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some citizens and deny it to others . . . than it may discriminate in the offering of the elective franchise." *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky,* 476 U.S. 79, 87 (1986). Nevertheless, when Congress passed the ADA, it was commonplace for the states to exclude persons with physical and mental disabilities from jury service without regard to their individual ability to function effectively as jurors.[51]

For instance, New York law excluded "infirm and decrepit" jurors for more than 150 years.[52] In 1984, an

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51 Examples of statutes barring service by jurors with disabilities are included in the Appendix (*e.g.*, App. 1, 15, 22).

52 *Lewinson v. Crews*, 282 N.Y.S.2d 83, 84-86 (App. Div. 1967) (excluding a blind college professor as a juror); *id.* at 87-88 (Hopkins, J., dissenting) (law in force since 1829), *aff'd*, 236 N.E.2d 853 (N.Y. 1968). New York courts continued to exclude blind persons from jury service

Alabama county "conceded that Shelby County is not equipped to accommodate jurors who have severe disabilities, and that Shelby County courts routinely excuse such persons from jury service, as do *all of the State's courts*." *Hill v. Shelby County,* 599 F. Supp. 303, 304 (N.D. Ala. 1984) (emphasis added). In 1978, an Arkansas federal judge found that "[i]mpairment of the senses, particularly the senses of sight and hearing, vitiates a person's ability to serve effectively as a juror." *Eckstein v. Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978). In 1985, the Missouri Supreme Court held that the categorical exclusion of "deaf, mute, deaf-mute, and blind persons from inclusion in the jury pool" was constitutional. *State v. Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). The District of Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway v. Superior Court*, 816 F. Supp. 12, 16 (D.D.C. 1993).[53]

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until the 1980s. *Jones v. New York City Transit Auth.*, 483 N.Y.S.2d 623, 625-26 (Civ. Ct. 1984); *Jackanin v. Carey*, 476 F. Supp. 420 (E.D.N.Y. 1979 (rejecting constitutional challenge to exclusion of blind juror), *aff'd mem.*, 633 F.2d 204 (2d Cir. 1980). Only with the passage of the ADA did the New York state courts cease excluding disabled persons solely because of their status and without regard to their individual abilities. *People v. Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990).

53 Even where the state legislature amended the law to remove statutory exclusions of disabled persons, some state courts continued to exclude all deaf persons from jury service. For example, in *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on the superior court for the State of Pennsylvania testified that "he would disqualify a deaf person under all circumstances."

B. States Have Also Excluded Disabled Litigants From Accessing The Courts

States have also historically denied persons with disabilities an equal opportunity to use the state courts as litigants in civil matters by failing to remove architectural and communications barriers that effectively exclude persons with mobility impairments or sensory impairments from using the court system. For example, in *Kroll v. St. Charles County,* 766 F. Supp. 744, 752 (E.D. Mo. 1991), the federal court found that the county court facilities were inaccessible to persons with disabilities, in violation of the ADA. Similarly, in 1984, Alabama officials admitted that its facilities were not properly accessible to litigants. *Hill*, 599 F. Supp. at 304.

The exclusion of persons with disabilities from court proceedings because of inaccessible court facilities has persisted since the passage of the ADA. In *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998), the Eighth Circuit concluded that the state of Arkansas had failed to provide sufficient accessibility to Montgomery County Courthouse, and that as a result, the quadriplegic plaintiff has been excluded from the state court system. *Id.* at 472.[54] In its 1997 report regarding the accessibility of the California court system to persons with disabilities, the California Judicial Council concluded that many California court buildings were not accessible to persons with disabilities, and that attitudinal barriers among

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54 *See also Matthews v. Jefferson*, 29 F. Supp. 2d 525, 533-34, 540 (W.D. Ark. 1998)(Marion County courthouse inaccessible; county "has excluded mobility impaired individuals from participation in its services, programs, [and] activities").

court personnel denied equal access to persons with disabilities.[55]

VI. STATES HAVE DENIED PERSONS WITH DISABILITIES THE RIGHT TO TRAVEL

The Constitution protects every citizen's right to travel from state to state. *See United States v. Guest*, 383 U.S. 745, 757 (1966). An integral part of this protection is the right of those moving to a new state to be treated equally in the new state of residence. *Saenz v. Roe*, 526 U.S. 489, 504-05 (1999). Many states, however, have affirmatively violated this constitutional right with regard to persons with disabilities by either prohibiting outright, or imposing substantial penalties upon, the entry of persons with disabilities into the states.

Historically, Alabama and other states forbade or restricted the entry of disabled persons. Alabama law banned the immigration of "persons suffering with contagious and communicable diseases, of cripples without means and unable to perform mental or physical service, of idiots, of lunatics, persons of bad character." 1907 ALA. LAWS 313 (App. 9). Missouri made it a crime to import or receive children "having any contagious or incurable disease or being of feeble mind or of vicious character" into the state. 1901 MO. LAWS 132 (App. 163). Mississippi provided that vessels bringing in any "infant, lunatic, maimed, aged, or infirm" person must post bond. 1906 MISS. LAWS 1011 (App. 160). Other states with similar requirements included California, (App. 35) Massachusetts (App. 192), and New York (App. 138). These laws are included in the Appendix. *See*

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55 *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8-10 (Jan. 1997).

generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1836 (Dec. 1993).

State governmental officials worried publicly that lax immigration policies were letting "defective" foreigners slip into the country and contaminate our gene pool.[56] A study by California's State Board of Charities and Corrections reported a strong "relation between race and mental deficiency." California State Bd. of Charities & Corrections, *Eighth Biennial Report*, 51 (1918). Noting that "the ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than among those of native American stock," the Board concluded that "California has drawn a large proportion of immigrants of an undesirable type." *Id.* at 13-14, 19.

These types of exclusionary statutes are not just relics from the past. Until a few months ago, Utah authorized its counties to restrict the travel rights "of any . . . idiotic or insane persons not having a lawful settlement in such county," or "of persons afflicted with or who have recently been exposed to any contagious disease." UTAH CODE ANN. § 17-5-252 (1999) (repealed May 1, 2000).

VII. STATES HAVE DISCRIMINATED AGAINST CHILDREN WITH DISABILITIES

Education is a "principal instrument in awakening the child to cultural values, in preparing him for later . . . training, and in helping him to adjust normally to his

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56 "Recent census statistics show that 80 per cent of the feeble-minded children in the general population of the United States are the progeny of aliens or naturalized citizens." N.Y. TIMES, Feb. 18, 1912. *See generally* Reilly, *supra* note 38, at 66.

environment." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). As they have done with children of racial minorities, states have historically excluded and segregated children with disabilities from the public schools. Virtually every state has excluded children with disabilities from public education, even when state constitutions required all children to attend school.[57] As state officials in Georgia put it, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is no philosopher's stone to turn the base metals of defect into gold."[58]

States regularly refused to educate children with disabilities, concluding that "[i]n the regular grades the feeble-minded and subnormal represent, as it were, an unassimilable accumulation of human clinkers, ballast, driftwood, or derelicts which seriously retards the rate of progress of the entire class and which often constitutes a positive irritant to the teach and the other pupils." J.E.W. Wallin, *The Education of Handicapped Children* (Houghton Mifflin, 1924) (*quoted in* M. Lazerson, *The Origins of Special Education* (1983)). New Mexico's constitution specifically excluded children with disabilities from public education: "Every child of school age *and sufficient physical and mental ability* shall be required to attend a public

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57 *See, e.g.*, IND. CONST. art. 8, § 1 (public schools must be "equally open to all"); MISS. CONST. art. 7, § 201 (public education required for all children between the ages of 6 and 21); N.D. CONST. art. 8, § 147 ("all children"). *See generally* Burgdorf, *A History of Unequal Treatment*, 15 SANTA CLARA LAWYER 855, 868 (1975); S. Sarason & L. Doris, EDUCATIONAL HANDICAP, SOCIAL POLICY AND SOCIAL HISTORY (1979).

58 Georgia Training School for Mental Defectives, Annual Report, at 4 (1922) (*quoted in* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 403 (1991)). *See also* Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1057-58 (1972).

school." N.M. CONST. art. XII § 5 (2000) (App. 187). State courts historically upheld the exclusion of these unfortunate citizens.[59]

Congress has compiled an extensive record of state-sponsored discrimination against children with disabilities. In enacting the Education for All Handicapped Children Act of 1975, Congress compiled an extensive record of such discrimination. *See* 20 U.S.C. § 1400(b) (Supp. IV 1980). When it enacted the ADA, Congress likewise compiled many examples of invidious education-related discrimination against children with disabilities. For example, Congress was told of a child confined to a wheelchair who was refused admission to public school "because the principal ruled that [she] was a fire hazard." S. Rep. No. 101-116, at 7. One Senator testified that his deaf brother was told that his schooling would be limited to preparing him for one of only three occupations – cobbler, printer, or baker – and that this educational limitation led to a life of frustration and missed opportunities. *Hearings*, *supra* note 7, at 16 (statement of Sen. Harkin).

State segregation of children with disabilities was common in the 1980s and early 1990s. For example, a 1988 study showed that states prohibited between 10 percent to 55 percent of students with severe disabilities from attending their neighborhood schools. Meyer & Putnam, *Social Integration in* HANDBOOK OF DEVELOPMENTAL AND PHYSICAL DISABILITIES 107, 114 (V. B. Van Hasselt, P. Strain & M. Hersen, eds., 1988). A national organization on mental retardation reported that in 1992-93, only 7.1 percent

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[59] *See, e.g., State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919) (excluding physically disabled child with normal mental functioning); *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (student "was too weak-minded").

of children with mental retardation received their education in regular classroom settings, and 56.8 percent of children with mental retardation were educated in separate classrooms, with little opportunity to interact with peers who did not have disabilities. *Report Card on Inclusion in Education of Children with Mental Retardation* (The Arc 1995). Even in the most recent years, states have continued to discriminate against children with disabilities.[60]

CONCLUSION

Alabama's claim (at p. 18) that "in passing the ADA, Congress did not identify any pattern or practice of unconstitutional state action, or for that matter even cite a single instance of such conduct," is simply wrong. Congress found that our society "is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are

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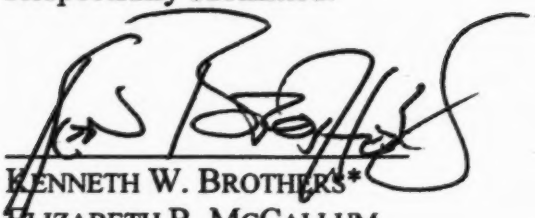
60 *See, e.g., Thomas ex rel. Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) (school illegally discriminated against expelled student because she had an autoimmune disease); *Martinez v. School Bd.*, 861 F.2d 1502 (11th Cir. 1988) (school improperly segregated a mentally-retarded student with AIDS by building a glass wall between her and the classroom); *Robertson v. Granite City Community Unit School District No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1988) (granting preliminary injunction against school district that isolated first-grader with AIDS); *Doe v. Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987) (exclusion of first-grader because he had AIDS); *Ray v. School Dist.*, 666 F. Supp. 1524 (M.D. Fla. 1987) (ordering school district to educate HIV-positive siblings to remain in school); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976) (exclusion of grade school child with spina bifida violated Rehabilitation Act of 1973, and due process clause of the Fourteenth Amendment); *In the Interest of H*, 218 N.W.2d 441, 445-46 (N.D. 1974) (although a "great many handicapped children in [North Dakota had received] no education at all, . . . [h]andicapped children are certainly entitled to no less than unhandicapped children under the explicit provisions of the [state] Constitution")

available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 101-116, at 106-07.

When it enacted the ADA, Congress had developed an extensive record proving that this "massive, society-wide discrimination" included widespread state-sponsored discrimination against persons with disabilities. This record amply supports the federal government's remedial power to ensure that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Respectfully submitted.



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